

Decision **PROPOSED DECISION OF ALJ BURCHAM** (Mailed 2/8/2016)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Anthony Zabit and Roberto Alvarez,

Complainants,

vs.

NetFortris Acquisition Co., Inc., and its
Officers, Grant Evans, Bryan Koehler, and
Tom Swayze,

Defendants.

Case 15-04-017
(Filed April 9, 2015)

DECISION DISMISSING COMPLAINT

Summary

This decision dismisses with prejudice the complaint by Anthony Zabit (Zabit) and Roberto Alvarez (Alvarez) against NetFortris Acquisition Co., Inc. (NetFortris) based upon the Joint Motion of Zabit, Alvarez, and NetFortris. The motion of the Commission's Safety and Enforcement Division for party status is denied. The case is closed.

1. Background

Complainants Anthony Zabit (Zabit) and Roberto Alvarez (Alvarez) allege that Defendant NetFortris Acquisition Co., Inc. (NetFortris) and its officers Grant Evans (Evans), Bryan Koehler (Koehler) and Tom Swayze (Swayze), violated various provisions of state and federal law and Commission orders and

decisions by surreptitiously recording telephone conversations between Zabit and Alvarez, and between Zabit and various NetFortris customers. Zabit and Alvarez further allege that NetFortris compiled call records that reveal the calling patterns and identity of Zabit and other NetFortris customers, that NetFortris did not notify the parties that their calls were being recorded or obtain consent of the parties for such recordings. Complainants allege these recordings were made and used by NetFortris in a business dispute between the parties rather than for any legitimate purpose relating to the provision of telecommunications services.

NetFortris timely filed an answer on June 17, 2015.¹ A Prehearing Conference (PHC) was held on August 27, 2015, to develop the procedural schedule and determine the issues properly within the scope of the proceeding. A scoping memo was issued on September 11, 2015, which stated that the scope of issues in the case involved whether the allegations by Zabit and Alvarez constituted violations of Commission General Order 107-B, Public Utilities Code Sections² 702, 761, and 7903, Tariff Rule 28, and federal law. The scoping memo included a proceeding schedule involving testimony and hearing dates for October and November 2015, and hearings in January 2016.

On September 28, 2015, Administrative Law Judge (ALJ) Burcham issued a ruling suspending the proceeding schedule at the request of parties so they could pursue a mediated settlement. The ALJ required parties to report on progress to him by November 2, 2015, and later extended this to November 9, 2015.

¹ Defendants requested and were granted two extensions of time to answer. The answer filed on June 17, 2015 was timely filed pursuant to these extensions.

² All statutory references are to the Public Utilities Code unless otherwise noted.

On November 12, 2015, Zabit, Alvarez and NetFortris filed a Joint Motion, requesting dismissal of the case with prejudice.

On November 23, 2015, the Commission's Safety and Enforcement Division (SED) filed a motion for party status in this case. The motion stated SED's belief that the public interest should be represented in this proceeding and that it expects to fully participate in the proceeding. SED served along with its motion a "Response and Opposition of the [SED] to the Parties' "Joint Motion to Dismiss Complaint with Prejudice."³ The SED response and opposition states that dismissal of the case should be delayed until SED has had a full opportunity to investigate the allegations of illegal conduct related to the parties' provision of telecommunications service in California.

On December 22, 2015, the Commission issued an Executive Director Order (Decision (D.) 15-12-055) dismissing the complaint upon written and unopposed request of all parties and closing the case. On January 4, 2016, the Executive Director issued an order rescinding D.15-12-055, stating he was unaware that there were two pending pleadings in the matter opposing the dismissal of the case. The order rescinding dismissal (D.16-01-001) stated the case would remain open in order for the pending pleadings (i.e., the motion by SED and its opposition to the dismissal) to be addressed.

2. SED Motion for Party Status

SED's motion for party status states that the public interest should be represented in this proceeding, as detailed in SED's companion Response and

³ The SED Response and Opposition served on November 23, 2015 was not accepted by the Docket Office because the motion by SED for party status had not been acted on. It is not on the record of this case.

Opposition. The motion does not state why SED did not appear earlier in this case, most notably at the August PHC or shortly after a scoping memo issued in the case. SED's motion for party status was filed ten days after Complainants and Respondents filed a joint motion for dismissal of the case, without explanation for the delay.

SED describes in its "Response and Opposition" that in the September 2015 time period, it had been reviewing the allegations and cross-allegations in the case and propounded data requests to NetFortris. SED also describes that NetFortris had asked SED to hold discovery in abeyance until the pending motion for dismissal of the case is decided.

SED's motion for party status is denied. The parties have settled their dispute and there is no reason to hold this case open further when the complainants seek dismissal. SED may at any time require NetFortris, as a telephone corporation certificated by the Commission to operate in California, to provide documents and other information to SED under authority granted by Sections 314⁴ and 581 *et seq.*⁵ Under Section 216(a), the definition of a public

⁴ Section 314(a) states in pertinent part that: "The commission, each commissioner, and each officer and person employed by the commission may, at any time, inspect the accounts, books, papers, and documents of any public utility. The commission, each commissioner, and any officer of the commission or any employee authorized to administer oaths may examine under oath any officer, agent, or employee of a public utility in relation to its business and affairs."

⁵ Section 581 states in pertinent part that: "Every public utility shall furnish to the commission in such form and detail as the commission prescribes all tabulations, computations, and all other information required by it to carry into effect any of the provisions of this part, and shall make specific answers to all questions submitted by the commission." Section 584 states in pertinent part that: "Every public utility shall furnish such reports to the commission at such time and in such form as the

Footnote continued on next page

utility includes a telephone corporation. NetFortris is a telephone corporation as defined in Section 234(a) because it is a “corporation or person owning, controlling, operating, or managing any telephone line for compensation within this state.” Therefore, there is no reason to leave this case open for SED to pursue an investigation of the operations and practices of NetFortris because SED may investigate NetFortris at any time.

3. Joint Motion for Dismissal

The Joint Motion states that the dispute between Zabit, Alvarez and NetFortris has been resolved through mediation and the parties have fully and finally resolved all issues that were the subject of this complaint.

Given the denial of party status to SED, the Joint Motion by Zabit, Alvarez and NetFortris for dismissal of the case with prejudice is unopposed. We will grant the Joint Motion and dismiss this case with prejudice.

4. Comments on Proposed Decision

The proposed decision of the assigned Administrative Law Judge in this matter was mailed to the parties in accordance with Section 311, and comments were allowed pursuant to Rule 14.3 of the Commission’s Rules of Practice and Procedure. No comments were filed.

5. Assignment of Proceeding

Liane M. Randolph is the assigned Commissioner and Administrative Law Judge Dan Burcham is the presiding officer in this proceeding.

commission may require in which the utility shall specifically answer all questions propounded by the commission.”

Findings of Fact

1. Complainants Zabit and Alvarez and Defendant NetFortris have fully and finally resolved the issues raised by complainants through mediation.
2. NetFortris is a public utility and telephone corporation as defined in Sections 216(a) and 234(a).
3. Under Sections 314 and 581 *et seq*, SED may pursue investigation of the operations and practices of NetFortris at any time, without this complaint remaining open.

Conclusions of Law

1. The joint motion by Zabit, Alvarez and NetFortris should be granted.
2. The motion for party status by SED should be denied.
3. C.15-04-017 should be dismissed with prejudice.

O R D E R

IT IS ORDERED that:

1. The November 12, 2015 Joint Motion by Anthony Zabit, Roberto Alvarez, and NetFortris Acquisition Company, Inc. to dismiss Case 15-04-017 with prejudice is granted.
2. The November 23, 2015 motion by the Safety and Enforcement Division for Party Status is denied.
3. Case 15-04-017 is closed.

This order is effective today.

Dated _____, 2016, at San Francisco, California.